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and MCKESSON CORPORATION

E-filing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WHA

TERRI RANDALL, an individual;
Plaintiff,

v.

ORTHO-MCNEIL PHARMACEUTICAL,
INC., a Delaware Corporation;
MCKESSON CORP. and DOES 1-500,
inclusive,

Defendants.

Case No. 07

3424

NOTICE OF REMOVAL AND REMOVAL
OF ACTION UNDER 28 U.S.C. § 1441(B)
[DIVERSITY]

TO THE CLERK OF THE COURT:

Defendant Ortho-McNeil Pharmaceutical, Inc. ("OMP") removes to this Court the state court action described below, based on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332, 1441(b). As detailed here, the Court should disregard the forum defendant rule because California resident defendant McKesson Corporation ("McKesson") was fraudulently joined.

BACKGROUND

1. On May 11, 2007, the Southern California law firms of Law Offices of Shawn Kohrrami and Kabateck Brown Kellner LLP and the Colorado law firm of Burg Simpson Eldredge Hersh Jardine PC filed a wrongful death action in the Superior Court of California, County of San Francisco, entitled *Terri Randall v. Ortho-McNeil*

1 *Pharmaceutical, Inc., McKesson Corp., and Does 1-500, inclusive*, Case Number CGC-
 2 07-463332. A copy of the Complaint in that San Francisco County state court action (the
 3 "Complaint") is attached as Exhibit A to the accompanying Declaration of Brenda N.
 4 Buonaiuto ("Buonaiuto Dec.").

5 The plaintiff in that action is a resident of Baltimore, Maryland, who seeks
 6 damages for the death of India C. Aziz, allegedly caused by decedent's use of the Ortho
 7 Evra® contraceptive patch, available only by prescription and manufactured by OMP.
 8 (Complaint ¶¶ 1-2, 11.) Plaintiff alleges causes of action for Negligence, Strict Liability
 9 Failure to Warn, Breach of Express Warranty, Breach of Implied Warranty, Negligent
 10 Misrepresentation, Fraud, and Wrongful Death against OMP, a Delaware corporation
 11 with its principal place of business in New Jersey.¹ (Complaint ¶ 12; Buonaiuto Dec. ¶
 12 3.) Although devoid of any factual allegations against McKesson, plaintiff's Complaint
 13 asserts those same claims against that defendant, a Delaware corporation with its
 14 principal place of business in San Francisco, California, whom plaintiff, a Maryland
 15 resident, alleges "distributed and sold Ortho Evra in and throughout the State of
 16 California." (Complaint ¶¶ 4, 17; Declaration of Greg Yonko, filed in *Abel, Theresa, et*
 17 *al. v. Ortho-McNeil Pharmaceutical, Inc., et al.*, USDC ND CA Case No. C 06 7551
 18 SBA ("Yonko Dec."), attached to the Buonaiuto Dec. as Exhibit B, ¶ 2.)

19 BASIS FOR JURISDICTION

20 2. Basis for Jurisdiction in this Court. This Court has original jurisdiction
 21 over this action, and OMP may properly remove to this Court, because the amount in
 22 controversy exceeds \$75,000, exclusive of interest and costs and there is diversity of
 23 citizenship of all named parties. 28 U.S.C. §§ 1332, 1441(a). Although McKesson is a
 24 resident of the forum, the forum defendant rule does not prevent this Court from taking
 25 jurisdiction of this action. *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933 (9th Cir. 2006)

26
 27 ¹ Although plaintiff alleges that she is "the proper party to maintain this action," she failed to file
 28 a sworn successor in interest affidavit or declaration, as required by Cal. Civ. Proc. Code Section 377.32,
 and OMP reserves its objection to this defect.

(holding that forum defendant rule limitation on diversity-based removal jurisdiction is a procedural, or non-jurisdictional, rule). Further, because McKesson was fraudulently joined, that rule should not apply.

a. Amount in Controversy. Pursuant to California Code of Civil Procedure Section 425.10(b), the amount of damages sought by plaintiff is not stated in the Complaint. However, plaintiff alleges that her decedent “suffered death as a result of ingestion of [Ortho Evra®].” (Complaint ¶ 2; *see also* ¶ 11.) Plaintiff further alleges that OMP engaged in “fraudulent” and “reckless” conduct, giving rise to punitive damages claims. (*See e.g.* Complaint ¶¶ 49, 52D, 63E, 64, 76, 82E, 91, 102.)

Based on a review of damages awards and settlement amounts in this judicial district, in cases involving allegations of death from the use of prescription drugs or medical devices, it is reasonably believed that, if plaintiff succeeded in proving the allegations of her Complaint, she would recover a minimum of \$75,000 in damages. (Buonaiuto Dec. ¶ 10.) Indeed, plaintiffs in the Ortho Evra® MDL have specifically alleged that the amount in controversy in their respective actions exceeds \$75,000, exclusive of interest and costs. (*Id.*)

It is therefore “facially apparent” from the nature of the claims alleged and the types of damages sought that the amount in controversy in this action exceeds \$75,000, exclusive of interest and costs. *See White v. FCI USA, Inc.*, 319 F.3d 672, 674 (5th Cir. 2003) (it was “facially apparent” that claim exceeded \$75,000 based on plaintiff’s “lengthy list of compensatory and punitive damages”); *see also In re Rezulin Products Liability Litigation*, 133 F.Supp.2d 272, 296 (S.D.N.Y. 2001) (concluding that complaint “obviously asserts a claim exceeding \$75,000” where plaintiff seeks “compensatory and punitive damages” for alleged “serious and life-threatening medical conditions” due to use of prescription medicine); *International Padi, Inc. v. Diverlink*, 2005 WL 1635347, *1 (9th Cir. Cal. 2005) (court considered plaintiffs’ general allegations of unspecified general and special damages “reasonably believed to be in excess of the jurisdictional limits” of the trial court and their request for injunctive relief to “easily conclude” that the

1 \$75,000 amount in controversy requirement was met).

2 b. Citizenship of the Parties. There is complete diversity of citizenship
3 between the parties, pursuant to 28 U.S.C. Section 1332. As alleged in the Complaint,
4 plaintiff is a citizen of Maryland. (Complaint ¶ 11.) At the time the state court action
5 was filed and at the time of this removal, OMP was and is a corporation existing under
6 the laws of the State of Delaware, with its principal place of business in New Jersey, and
7 McKesson was and is a corporation existing under the laws of the State of Delaware, with
8 its principal place of business in California. (Buonaiuto Dec. ¶ 3; Yonko Dec. ¶ 2.)

9 c. Forum Resident Defendant McKesson has been Fraudulently Joined.
10 Given that the forum defendant rule is procedural – and not jurisdictional – the fact that
11 McKesson has its principal place of business in San Francisco does not prevent removal
12 of this action. *See, Wild Oats, supra*. Further, the Court should disregard the rule, as
13 plaintiff fraudulently joined McKesson as a “sham” defendant, solely in an effort to
14 invoke the rule and to prevent OMP from removing the action to federal court and then
15 transferring it to the Ortho Evra® MDL.

16 A defendant is fraudulently joined if “the plaintiff fails to state a cause of action
17 against the defendant, and the failure is obvious according to the settled rules of the
18 state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). “When
19 determining whether a defendant is fraudulently joined, “[t]he court may pierce the
20 pleadings, consider the entire record, and determine the basis of joinder by any means
21 available.”” *Maffei v. Allstate California Ins. Co.*, 412 F.Supp.2d 1049 (E.D.Cal. 2006),
22 *citing Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D.Cal. 1979) (“it is well settled that upon
23 allegations of fraudulent joinder ... federal courts may look beyond the pleadings to
24 determine if the joinder ... is a sham or fraudulent device to prevent removal”). If
25 revealed that the joinder is fraudulent, the Court may dismiss the sham defendant.
26 *Maffei, supra*. McKesson is so fraudulently joined here.

27 McKesson is fraudulently joined because plaintiff has not made any material
28 allegations against it. *See e.g. Brown v. Allstate Insurance*, 17 F.Supp.2d 1134, 1137

(S.D.Cal. 1998) (finding in-state defendants fraudulently joined where “no material allegations” against those defendants were made). Here, as demonstrated by the Complaint, plaintiff’s claims are substantively directed against the manufacturer of Ortho Evra® – OMP, and not at McKesson. Indeed, none of plaintiff’s factual allegations, on which all of her causes of action are based, involve McKesson. (See “General Allegations” at Complaint ¶¶ 25-40.)

Plaintiff claims that: OMP obtained FDA approval of Ortho Evra®, despite concerns about its safety; OMP failed to appropriately warn users and prescribing health care providers of the alleged serious risks of using Ortho Evra®; OMP failed to properly or adequately investigate safety concerns about Ortho Evra®; OMP’s conduct fell below the duty of care that it allegedly owed to plaintiff (which plaintiff presumably meant was allegedly owed to her decedent); OMP misrepresented the known risks associated with Ortho Evra®; OMP negligently and recklessly failed to inform the public and prescribing health care providers of the alleged risks of using Ortho Evra®; and OMP was careless and negligent in its manufacturing, testing, selling, distributing, merchandising, advertising, promoting, packaging, and marketing of Ortho Evra®.² (*Id.*) Those allegations have everything to do with the claimed acts and omissions of OMP, and nothing to do with McKesson.

The only factual allegations that do relate to McKesson fail to state a claim against that defendant. Plaintiff alleges that McKesson “distributed and sold Ortho Evra in and throughout the State of California,” and that McKesson “packaged, distributed, supplied, sold, placed into the stream of commerce, labeled, described, marketed, advertised, promoted and purported to warn or to inform users regarding the risks pertaining to, and assuaged concerns about the pharmaceutical Ortho Evra.” (Complaint ¶¶ 4, 20.) Notably absent is any allegation that plaintiff’s decedent fell within the general class of “users”

² As detailed in its Answer, filed simultaneously with this Removal, OMP denies plaintiff’s allegations and denies that it is liable to plaintiff in any manner or sum whatsoever.

1 referenced by plaintiff's conclusory allegations. Even more telling, plaintiff does not
 2 allege that McKesson distributed or sold Ortho Evra® to her decedent or to any of her
 3 decedent's health care providers or pharmacists. (See Complaint.) Further, the
 4 Complaint lacks any allegation that McKesson sold or distributed Ortho Evra® outside
 5 the State of California, where plaintiff's decedent presumably lived. See 28 U.S.C. §
 6 1332(c)(2) (providing, in part, "the legal representative of the estate of a decedent shall
 7 be deemed to be a citizen only of the same State as the decedent"). The absence of such
 8 allegations compels the conclusion that plaintiff fraudulently joined McKesson. See e.g.
 9 *Lyons v. American Tobacco Co.*, 1997 WL 809677 at *5 (S.D. Ala. 1997) (holding that
 10 there is "no better admission of fraudulent joinder" than the failure of plaintiff "to set
 11 forth any specific factual allegations" against the joined defendant).

12 In short, plaintiff fails to allege that her decedent received Ortho Evra® sold or
 13 distributed by McKesson, a prerequisite to her product liability claims. It is essential that
 14 a plaintiff who claims that a product distributed by defendant was defective must prove
 15 that defendant was the distributor. *Garcia v. Joseph Vince Co.*, 84 Cal.App.3d 868, 874
 16 (1978) ("Regardless of the theory which liability is predicated upon ... it is obvious that to
 17 hold a producer, manufacturer, or seller liable for injury caused by a particular product,
 18 there must first be proof that the defendant produced, manufactured, sold, or was in some
 19 way responsible for the product"). Notwithstanding, given that the crux of plaintiff's
 20 claims is an alleged failure to warn of the alleged risks of using Ortho Evra®, there is no
 21 legal basis for the causes of action asserted against McKesson.

22 Under California law, McKesson bears no duty to warn. Rather, the "learned
 23 intermediary doctrine" provides that the duty to warn of a drug's risk runs from the
 24 manufacturer to the physician, and then from the physician to the patient. See *Brown v.*
 25 *Superio Court (Abbott Labs.)*, 44 Cal.3d 1049, 1061-62, n.9 (1988); *Carlin v. Superior*
 26 *Court (Upjohn Co.)*, 13 Cal.4th 1104, 1116 (1996). The rationale of the learned
 27 intermediary doctrine is that the physician is in the best position to determine whether a
 28 patient should use a prescription drug, and imposing a duty to warn on others would

1 threaten to undermine reliance on the physician's informed judgment. For this reason,
 2 California courts have rejected imposing liability on distributors, including specifically
 3 McKesson, for failure to warn of the risks of using a prescription drug. *See e.g. Barlow*
 4 *v. Warner-Lambert Co.*, Case No. CV-03-1647-R(RZx), Slip Op. at 2 (C.D.Cal. April 28,
 5 2003) (attached as Ex. C to the Buonaiuto Dec.) ("the Court finds that there is no
 6 possibility that plaintiffs could prove a cause of action against McKesson, an entity which
 7 distributed [the prescription medication at issue] to pharmacists in California;" motion to
 8 remand denied); and *Skinner v. Warner-Lambert Co.*, Case No. CV-03-1643-R(RZx),
 9 Slip Op. at 2 (C.D.Cal. April 28, 2003) (attached as Ex. D to Buonaiuto Dec.) (same).

10 Further, McKesson had no involvement in the development or preparation of the
 11 prescribing information for Ortho Evra® and did not have any responsibility for the
 12 content of other written warnings concerning Ortho Evra®. (Yonko Dec. ¶ 5.) At no
 13 time has McKesson had any involvement with the manufacture, development, testing,
 14 packaging, labeling, advertising, promotion, or marketing of Ortho Evra®. (*Id.* ¶¶ 6-7.)

15 It is therefore a mystery why McKesson is named in this case, other than as a
 16 "sham" defendant to prevent OMP from removing the action to federal court and then
 17 transferring it to the Ortho Evra® MDL. Courts have consistently ruled that such
 18 collusive tactics are not to be recognized. *See e.g. Attorneys Trust v. Videotape*
 19 *Computer Products, Inc.*, 93 F.3d 593 (9th Cir. 1996) (noting there is no more reason for
 20 federal courts to countenance destruction of jurisdiction by the use of straw parties than
 21 there is for them to countenance the creation of jurisdiction in that manner); *Grassi v.*
 22 *Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990), *citing* American Law Institute, Study
 23 of the Division of Jurisdiction Between State and Federal Courts, Official Draft, at 169
 24 (1969) ("Removal based on diversity of citizenship is a right conferred by Congress, the
 25 need for which 'may well be greatest when the plaintiff tries hardest to defeat it.'").

26 d. Citizenship of Doe Defendants. Pursuant to 28 U.S.C. Section
 27 1441(a), for purposes of removal, the citizenship of defendants Does 1-500 must be
 28 disregarded because plaintiff sued those defendants under fictitious names.

REMOVAL TIMELY FILED

3. Service was made on OMP's registered agent for service of process on June 12, 2007. (Buonaiuto Dec. ¶ 3.) McKesson was served, via its registered agent, on June 20, 2007. (*Id.* ¶ 4.) Therefore, this Removal was timely filed within 30 days of service, pursuant to 28 U.S.C. § 1446(b).

CONSENT TO REMOVAL

4. The only other named defendant, McKesson, was fraudulently joined, and its consent is therefore not required for removal; notwithstanding, McKesson consents to OMP's removal of this action to this Court. (Buonaiuto Dec. ¶ 4.)

STATE COURT WITHIN THE COURT'S JURISDICTION

5. The San Francisco County, California Superior Court, from which OMP removes this action, is within this Court's jurisdiction.

STATE COURT PLEADINGS

6. Copies of the state court pleadings known to OMP to have been filed in this action are collectively attached to the Buonaiuto Dec. as Exhibit A.

FILING AND SERVICE OF NOTICE OF REMOVAL AND REMOVAL

7. OMP will file a notice of the filing of this Notice of Removal and Removal in the San Francisco County Superior Court and will serve plaintiffs' counsel with a copy. (Buonaiuto Dec. ¶ 5.)

WHEREFORE, OMP hereby removes to this Court San Francisco County Superior Court Case No. CGC-07-463332.

Dated: June 29, 2007

DRINKER BIDDLE & REATH



BRENDA N. BUONAIUTO

Attorneys for Defendants

ORTHO-MCNEIL PHARMACEUTICAL,
INC. and MCKESSON CORPORATION